IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 15TH DECEMBER 2006 / 24TH AGRAHAYANA 1928

WP(C).No. 30214 of 2006(V)

OS.273/2006 of II ADDL.SUB COURT,KOZHIKODE

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PETITIONER:

AZHAKODI DEVI CHARITABLE TRUST (REGD.),
REP. BY ITS SECRETARY, E.REGUNATHAN,
RESIDING AT REMMLA, THIRUTHIYAD,
PUTHIYARA, CALICUT.

BY ADV. SMT.PRABHA R.MENON
SRI.M.KRISHNAKUMAR

RESPONDENTS:

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1. COMMISSIONER, HR & CE (ADMN.)DEPARTMENT,
CIVIL STATION, NEDUNGOTTUR AMSOM,
DESOM, KOZHIKODE TALUK.

2. DEPUTY COMMISSIONER,
HR & CE (ADMN.), DEPARTMENT,
CIVIL STATION, NEDUNGOTTUR AMSOM, DESOM,
KOZHIKODE TALUK.

3. EXECUTIVE OFFICER,
SRI. AZHAKODI DEVI TEMPLE,
THIRUTHIYAD, KOZHIKODE.

BY GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 15/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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W.P.(C) NO.30214 OF 2006

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Dated this the 15th day of December,2006

JUDGMENT

Whether in a suit instituted by a party, aggrieved by an order passed by the Commissioner under section 61 of the Act, as provided under section 62 of the Act, a notice under section 80 of the Code of Civil Procedure is necessary?

2. Petitioner is the plaintiff in O.S.273/06 on the file of Sub Court, Kozhikode. The suit was filed against the order passed by the Commissioner under section 62(1) of Madras Hindu Religious and Charitable Endowments Act,(hereinafter referred to as the Act). There are twenty defendants in the suit. Defendants 1 to 14 are `A' party and defendants 15 to 17 `B to B4 parties in O.A.4/05 which was originally disposed by the Deputy Commissioner and its appeal by the Commissioner. Defendant No.18 is the Commissioner and defendant No.19 the Deputy Commissioner of H.R. &C.E.

Defendant No.20 is the Executive Officer of the temple. As per order dated 29.6.06 passed by defendant No.18 under section 61 of the Act, in the appeal filed by petitioner against the order passed by defendant No.19 under section 57 of the Act, petitioner Trust was restrained from functioning in the temple premises or taking public collection in the name of Azhakodi Devi temple. After the dismissal of the appeal by defendant No.18 petitioner instituted the suit as provided under section 62 of the Act. Along with the parties to the proceedings in the appeal petitioner impleaded the Commissioner who passed the order in the appeal, and the Deputy Commissioner who passed the original order challenged in the appeal. In addition the Executive Officer of the temple was also impleaded. In the suit, petitioner sought a decree to set aside the order passed by defendant No.19 as well as the order passed by defendant No.18 , as against the petitioner trust and also a decree for

permanent prohibitory injunction restraining any action being taken pursuant to the said orders. Along with the suit, petitioner filed I.A.3903/06 an application under sub section (2) of Section 80 of Code of Civil Procedure for leave of the court to institute the suit as against defendants 18 and 19 without serving a notice as provided under sub section (1) of Section 80 contending that as urgent relief is to be sought in the suit there is no time to send a notice as provided under sub section (1) of Section 80 before instituting the suit. Under Ext.P3 order, learned Sub Judge dismissed the application and returned the plaint for compliance with the provisions of Section 80. Instead of sending a notice as provided under sub section (1) and representing the plaint, this petition is filed under Article 227 of Constitution of India challenging Ext.P3 order passed by the learned Sub Judge. Petitioner contended that as the suit was filed as provided under section 62 of the Act, it is not necessary to send a notice under section 80

of the Code of Civil Procedure and therefore the order to return the plaint for compliance with the provisions of Section 80 is illegal and is to be set aside.

3. Learned counsel appearing for petitioner and respondents and the Government pleader were heard.

4. The argument of learned counsel appearing for petitioner was that petitioner has a statutory remedy of instituting a suit as provided under Section 62 of the Act, after dismissal of the appeal as provided under sub section 61 of the Act and in such a suit, no notice under section 80 is necessary. It was argued that a notice under section 80 is to be sent, so that the Public Officer or the State could consider the claim raised by the petitioner and correct the omission or mistake if any and when defendants 18 and 19 in exercise of their statutory function disposed of the proceedings and appeal, no purpose will be served by sending a notice as provided under section 80 as they are incompetent to correct the

order passed by them in the proceedings or in the appeal and therefore there is no necessity to issue a notice as provided under section 80 at all. It was argued that eventhough petitioner by mistake filed an application for leave under sub section (2) of Section 80, it is to be held that no notice under section 80 is warranted and therefore the return of the plaint is illegal and the order is to be set aside.

5. Learned counsel appearing for respondents argued that in a suit instituted under section 62 of the Act, Commissioner or Deputy Commissioner who passed the orders are not necessary parties and even if they are made parties , there is no necessity to implead the Executive Officer who has nothing to do with the orders passed except that directions contained in the order are to be obeyed by defendant No.20 in his capacity as Executive Officer and as defendants 18 to 19 were impleaded, learned Sub Judge rightly found that notice under section 80 is mandatory and therefore no

interference is warranted in the order. Learned Government pleader also submitted that Section 80 notice is necessary and the order passed by the Sub Judge is perfectly in order.

6. Section 62 of the Act provides for institution of suits and appeal. Under clause (ii) of sub section (1) of Section 62 any party aggrieved by an order passed by the Commissioner under sections 57, 58 or 60 is entitled to file a suit within ninety days from the date of receipt of such order and the court is competent to modify or cancel such order, though it shall have no power to stay the Commissioner's order pending disposal of the suit. The order passed by the Deputy Commissioner was under section 57(c). It was challenged before the Commissioner in the appeal filed by the petitioner. The Commissioner disposed the appeal as provided under section 61. Hence petitioner has a right to file a suit under section 62 (1)(ii) of the Act. The suit was instituted as provided under section 62 (1)(ii) of the Act. The

question whether Commissioner or Deputy Commissioner or the Executive Officer are necessary parties to the suit is not to be decided in this petition. It is to be considered only in the suit.

7. The learned counsel appearing for petitioner relied on the decision of a learned single Judge of High Court of Andhra Pradesh in **Chunduru Chenchuramaiah Sett. v. Deputy Commissioner, Hindu Religious and Charitable Endowments, Andhra Pradesh Kurnool (AIR 1966 A.P.123).** That was a suit instituted as provided under section 62 of the Madras Hindu Religious and Charitable Endowments Act. A contention was raised in the suit that a notice as provided under section 80 is necessary. The learned single Judge held that orders passed by the Deputy Commissioner under section 68 of the Act and by the Commissioner under section 61 of the Act are judicial orders and a right of suit is provided under section 62 to set aside the judicial orders passed by the

Deputy Commissioner and the Commissioner and they are not sued in their capacity as Public Officers but only as a statutory body and therefore no notice as provided under section 80 of Code of Civil Procedure is necessary.

8. A learned single Judge of this court in **Sringapuram Kambola Gouda Saraswath Brahmin Samooham Committee v. Cochin Devaswom Board (1965 KLT 723)** has considered a similar question. That was a case where the suit filed by the plaintiff under section 114(2) of Travancore Cochin Hindu Religious Institutions Act was dismissed by the trial court holding that there is no notice as provided under section 124(1) of the Act. The learned single Judge relying on the decision of the Apex Court in **State of Madras v. C.P.Agencies (AIR 1960 SC** 1**309)**held that the objection of Section 80 is manifestly to give the Government or the Public Officer sufficient notice of the case, which is proposed to be brought against it or him, so that

it or he may consider the position and decide for itself or himself, whether the claim of the plaintiff should be accepted or resisted. It was held that in such a suit coming under section 114 (2) of Travancore Cochin Hindu Religious Institutions Act, no such question of acceptance or resistance arises and as far as the Board is concerned, the Board having taken a decision under sub section (1), there is no further question for it to consider and accept the claim of the affected party who seeks to file the suit under sub section (2). Applying the principles involved in deciding the necessity of a notice under section 80 of the Code of Civil Procedure, it was held that no notice is necessary. The learned Judge has also held that if suit is only a continuation of the previous proceeding, no notice under section 80 of the Code of Civil Procedure or Section 124 of that Act is necessary.

9. I am in full agreement with the principles enunciated in those cases. The suit instituted by

the petitioner before Sub Court, Kozhikode which was returned by the Sub Judge under Ext.P3 order, is a suit instituted as provided under section 62 (1) (ii) of the Act. Finality of the order passed by the Commissioner under section 61, in an appeal confirming the order passed by the Deputy Commissioner under section 57(c) of the Act, is subject to the right to file a suit available to the petitioner, as provided under section 62(1) of the Act. Sub section (2) of Section 62 specifically provide that the civil court in such a suit is competent to modify or cancel such orders passed by the Commissioner. Therefore the suit provided under section 62 can only be taken as continuation of the proceedings initiated by the Deputy Commissioner under section 57(c) and disposed by the Commissioner under section 61 of the Act. The question is whether in such a suit a notice under section 80 is necessary?

10. Sub section (1) of Section 80 of the Code of Civil Procedure provides that no suit shall be

instituted against the Government or against a Public Officer in respect of any act purporting to be done, by the Public Officer in his official capacity until the expiration of two months next after notice in writing has been delivered or left at the office of the concerned Government or the Public Officer stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims and the plaint shall contain a statement that such notice has been so delivered or left. As observed by the learned single of this court in **Sringapuram Kambola Gouda Saraswath Brahmin Samooham Committee's case (supra)**the very purpose of sending a notice as provided under sub section (1) of Section 80 is to bring to the notice of the Government or the Public Officer the claim of the petitioner so that the Government or the Public Officer may consider the position and decide for themselves whether the claim raised is to be accepted or resisted. When

defendants 18 and 19, in exercise of the powers provided under section 57 and 61, have already decided the matter and passed quasi judicial orders, there is no question of reconsidering the same by receipt of a notice as provided under sub section (1) of Section 80. In such circumstance, in a suit instituted by a party to the proceedings or appeal as provided under section 62 (1) of the Act there is no necessity to send a notice under section 80 of Code of Civil Procedure.

11. The question when a statute itself provide filing of a suit, whether notice under section 80 of the Code was considered by a Divisional Bench of High Court of Madras in **Tholappa Iyengar v. Executive Officer, (1993) 2 Madras L.W) 537.)** The Division Bench was considering section 70 of Tamilnadu H.R. & C.E. Act identical to Section 62 of the Act. Their Lordships held:-

> "On the basis of the judicial consensus thus we are in a

position to say that a notice under section 80 of the Code of Civil Procedure, 1908 is unnecessary, if having regard to the nature of the suit and the capacity and the context in which public officers have been impleaded, it is found that no purpose can be served by notice to such officers. The fact that the officer concerned has acted judicially or quasi-judicially may be one such fact which will lead to the conclusion that the purposes of the suit is not to sue the officer for any such act done by him in his official capacity which shall attract, S.80, of the Code of Civil Procedure, 1908. The fact that a special procedure is created

and a special jurisdiction is conferred for a certain type of adjudication upon a public officer and in that official capacity he is required to decide a dispute or a matter and suit is provided as a remedy under the Special Act for the cancellation or modification of the order of such public officer shall also be a fact showing that such act done by such public officer in his official capacity will not attract S.80, of the Code of Civil Procedure, 1908. As the Supreme Court has said, the provisions in S.80, of the Code of Civil Procedure 1908 are not intended to be used as boobytrap against the ignorant illiterate persons, but are

intended to advance justice by affording on the one hand a person intending to sue the Government or a public officer in respect of any act purporting to be done by such public officer in his official capacity opportunity to demand from the Government or such public officer redressal of his grievance within two months next after notice, and on the other hand to provide to the Govern ment or the officer concerned opportunity to consider whether the Government or the officer should contest the claim and/or to grant the relief as asked for and thus avoid unnecessary litigation. The scheme of the suit under Section 70 of the

Endowments Act, in particulars, leaves no option with the Commissioner to rescind, review or recall his order. Once this is the position, it is unimaginable that a notice is necessary to afford to the Commissioner opportunity to consider the redressal of the grievances of the person who sought relief by way of a suit under section 70(1) of the Endowments Act. In the case of a public officer, in particulars, if there is no claim made against him in person it is obvious that he is not sued as such for any relief against him. In fact, one may be inclined to think that the officer is not a necessary party

> and he need not be sued and he has not been sued in his personal capacity at all in such a case, since however, the Endowments Act has on the one hand vested these officers with the power to adjudicate in certain disputes and matters, it has also made them administratively responsible for the affairs of the religious Endowments, it is only proper that they are impleaded as a party...”

The view taken by the Division Bench fortifies the view taken earlier.

12. The fact that petitioner under a misapprehension filed an application for leave to institute the suit, without sending a notice as provided under section 80 of the Code of Civil Procedure, will not make the legal position

different because if no notice under section 80 is warranted, there is no necessity to send a notice for the mistaken impression of the petitioner. If that be so, the finding in Ext.P3 order that suit is to be instituted only after sending a notice as provided under section 80 of the Code is unsustainable. Ext.P3 order is quashed. Learned Sub Judge is to take the suit into file and dispose the same in accordance with law. The question whether notice as against the defendant No.20 is necessary or not is to be considered by the learned Sub Judge. Under Ext.P3 order that aspect was not considered as petitioner had only sought leave to file suit as against defendants 18 and 19 in I.A.3903/06. Therefore there was no necessity for the court at that time to consider the question whether notice under section 80 of the Code is necessary as against defendant No.20 who did not pass any order challenged suit and as such was not a necessary party, to get the orders passed by the Commissioner and the Deputy Commissioner set

aside.

Writ Petition is disposed as above.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006